

MOTION FILED
JUN 1 1989

No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY
COMMISSION OF ILLINOIS.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF THE NATIONAL BOARD OF TRIAL ADVOCACY
IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

TIMOTHY WILTON*
Professor of Law
Suffolk University Law School
Beacon Hill
Boston, MA 02114
(617) 573-8214

Counsel for Amicus Curiae

* Counsel of Record

June 1, 1989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY
COMMISSION OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Board of Trial Advocacy hereby moves for leave to file the attached brief *amicus curiae* in support of the Petition for a Writ of Certiorari in this case. The consent of the petitioner has been obtained. The consent of the respondent was requested but refused. The National Board of Trial Advocacy was permitted to participate as *amicus curiae* in this case in the Illinois Supreme Court, over the opposition of respondent.

STATEMENT OF INTEREST

This case involves the professional discipline of an attorney, petitioner Gary E. Peel, by the respondent Attorney Registration and Disciplinary Commission of Illinois, for indicating on his letterhead that he is a "Certified Civil Trial Specialist By the National Board of Trial Advocacy." Petitioner has sought review by this Court because

this decision conflicts with this Court's decisions regarding the First Amendment rights of attorneys to convey and of the public to receive truthful and non-deceptive information concerning the qualifications of a lawyer and because it conflicts with the holdings of the Supreme Courts of two other states, Minnesota and Alabama, on this precise issue — the public statement of certification by the National Board of Trial Advocacy.

The National Board of Trial Advocacy was founded eleven years ago for the purpose of providing rigorous, objective criteria for the certification of Civil or Criminal Trial Specialists in the legal profession. The Board was organized following the model in the medical profession, where physicians may become Board Certified in their specialty. The purpose for such specialty certification is not only to improve the legal profession by providing substantial standards to which trial lawyers may aspire, but also to improve the delivery of legal services to the public by providing an objective, verifiable measure of experience and ability in the specialty, so that the choice of an attorney may be more fully informed.

The National Board of Trial Advocacy has been endorsed by and is sponsored by several well-respected major national organizations of lawyers who are interested in the quality of the trial bar: American Board of Professional Liability Attorneys, Association of Trial Lawyers of America, International Academy of Trial Lawyers, International Society of Barristers, National Association of Criminal Defense Lawyers, National Association of Women Lawyers and the National District Attorneys Association. In addition, the Board of Directors and Honorary Board of the National Board of Trial Advocacy includes a large number of well-respected trial lawyers throughout the nation, as well as four United States District Court Judges, one United States Court of Appeals Judge, and two State Supreme Court Justices, two law school professors and one law school dean.

The National Board of Trial Advocacy has certified over 1,000 civil or criminal trial specialists in all 50 states, the District of Columbia and the Virgin Islands. The ability of these 1,000 certified trial specialists to inform the public of their certification is central to the purpose for certification and the National Board of Trial Advocacy. The National Board of Trial Advocacy and its members, therefore, have a strong interest in supporting the right of these lawyers to indicate the true and accurate fact of their certification in their stationary and/or in any advertising.

REASON FOR AMICUS CURIAE BRIEF

Central to the determination of whether this Court should grant certiorari are two issues: whether certification by the National Board of Trial Advocacy is meaningful, so that its communication to the public would be non-deceptive; and whether there is substantial disagreement among the states of the propriety of publicly communicating certification by the National Board of Trial Advocacy. The National Board of Trial Advocacy is in a unique position to inform the court of the nature of its certification process, its standards and reliability, so that the Court may properly understand the significance and meaning of a lawyer's certification as a Criminal or Civil Trial Specialist by the National Board of Trial Advocacy. In addition, the National Board of Trial Advocacy is in a unique position to inform the Court of the various ways the states have permitted or prohibited the public statement of certification by the National Board of Trial Advocacy.

CONCLUSION

Because it is in a unique position to inform this Court of the nature and meaning of its certification, and because it has a strong interest in the outcome of the case, the National Board of Trial Advocacy respectfully requests leave to file an *amicus curiae* brief in support of the petition for a writ of certiorari in this case.

Respectfully submitted,
NATIONAL BOARD OF TRIAL ADVOCACY

by its attorney,

Timothy Wilton
Professor of Law
Executive Director

National Board of Trial Advocacy
in residence at:
Suffolk University Law School
Beacon Hill
Boston, MA 02114-4280
(617) 573-8700

Table of Contents

Table of Authorities	i
Statement of Interest	1
Reasons for Granting the Writ	1
Introduction	1
I. THE STATEMENT THAT A LAWYER IS CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY PROVIDES ACCURATE, MEANINGFUL AND HELPFUL INFORMATION TO THE PUBLIC AND IS NOT MISLEADING OR DECEPTIVE BECAUSE THE NATIONAL BOARD OF TRIAL ADVOCACY IS A WELL-RESPECTED, REPUTABLE AGENCY WHICH APPLIES OBJECTIVE, VERIFIABLE, RIGOROUS AND MEANINGFUL STANDARDS IN ITS CERTIFICATION PROCESS	
II. TWO STATE SUPREME COURTS HAVE HELD THAT A STATEMENT OF NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION IS NOT DECEPTIVE AND THAT THEIR DISCIPLINARY RULES WHICH PROHIBITED SUCH SPEECH CONFLICTED WITH THE FIRST AMENDMENT; UNTIL THIS CASE NO COURT HAS EVER HELD TO THE CONTRARY; OTHER STATES HAVE ALSO FORMALLY RECOGNIZED NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION	11
Conclusion	14

Table of Authorities

Ex Parte Howell, 487 So. 2d 848 (Ala. 1986)	12, 13
In Re Johnson, 341 N.W. 2d 282 (Minn. 1983)	11, 12

88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY
COMMISSION OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE NATIONAL BOARD OF TRIAL ADVOCACY
IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST

Please see the Motion for Leave to file Brief *Amicus Curiae*,
supra, for the Statement of Interest of the National Board of Trial
Advocacy in this case.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves the professional discipline by the Illinois
Attorney Registration and Disciplinary Commission of Gary Peel,
an Illinois attorney, for indicating on his office letterhead that he is
a "Certified Civil Trial Specialist By the National Board of Trial
Advocacy." There is no contention that this statement is false; Mr.
Peel in fact met the extensive and demanding concentration,

experience, education and peer review standards, passed the six hour written examination required for certification by the National Board of Trial Advocacy and was certified as a Civil Trial Specialist on September 1, 1981. Certification by the National Board of Trial Advocacy is reviewed every five years, and Mr. Peel again satisfied the experience, concentration, education and peer review requirements and was recertified on September 1, 1986.

There is also no dispute that Mr. Peel indicated the fact of his certification on his office letterhead, and that such an action is in apparent conflict with Illinois Disciplinary Rule (DR) 2-105. This rule was patterned after one recommended to the States by the American Bar Association in its Model Code of Professional Responsibility, and continues to be recommended in substantially similar form as ABA Model Rule of Professional Conduct 7.4. Many states throughout the country apply DR 2-105 or Model Rule 7.4, though others have created exceptions for lawyers certified by State certification programs or by the National Board of Trial Advocacy,¹ and still others have simply deleted Model Rule 7.4 when adopting the Model Rules.²

As applied to certification by the National Board of Trial Advocacy, however, DR 2-105 conflicts with the First Amendment right of a lawyer to convey, and of the public to receive, truthful, relevant, and helpful information which will assist the public in making an informed choice of an attorney. This Court has held that advertising by a lawyer is "commercial speech" protected by the First Amendment and cannot be banned, but may only be regulated to the extent

1. States which have their own certification plans include: Arizona, Arkansas, California, Florida, Louisiana, New Jersey, New Mexico, North Carolina, South Carolina, Texas, and Utah. Most of these certify only two or three specialties. Specialists in non-certified areas apparently are prohibited from indicating their specialization. States which have formally approved National Board of Trial Advocacy certification include: Alabama, Connecticut, Georgia and Minnesota.

2. States which have adopted the Model Rules, but deleted Rule 7.4 include: Kansas, Michigan, North Dakota, and Wyoming. Oklahoma and Rhode Island also have no specific rule on specialties, requiring only that such communications not be misleading. Montana has amended Model Rule 7.4 to permit statements of specialization where a lawyer "is a specialist in a certain field of law by experience in the field, by specialized training or education in the field, or by certification by an authoritative professional entity in the field."

necessary to insure that it is not false or deceptive.

Part I of this brief will demonstrate that a factually accurate statement by a lawyer that he is certified as a Civil Trial Specialist by the National Board of Trial Advocacy is not deceptive. That section will describe the National Board of Trial Advocacy, the rigorous and objective standards which must be met by an applicant attorney, and the process by which an attorney may become certified. From this description, it will become clear that an attorney who has met these standards in fact possesses experience and a special competence beyond that which is required for admission to the bar. A true statement of an attorney's certification, therefore, is not deceptive and would not mislead the public but would instead provide it with truthful, relevant information which is helpful in the selection of an attorney.

Part II will discuss how other states have treated the National Board of Trial Advocacy. The Supreme Courts of Minnesota and Alabama have declared their disciplinary rules, which were similar to Illinois' DR 2-105, to be unconstitutional as applied to National Board of Trial Advocacy certification, because they interfered with the certified attorney's First Amendment right to convey truthful, accurate and non-deceptive information to the public. No court has held to the contrary, other than Illinois in this case. Other states have amended their ethical rules to permit a statement of specialty certification so long as the lawyer is certified by an approved agency with substantial standards. The National Board of Trial Advocacy is an approved agency in those states.

The National Board of Trial Advocacy suggests, therefore, that this Court should grant the writ of certiorari and hold that it is improper to discipline an attorney for stating the true fact of his National Board of Trial Advocacy certification, and that DR 2-105, as applied to National Board of Trial Advocacy certification, is unconstitutional. Illinois may then choose, as the Supreme Courts of Minnesota and Alabama did, to form a committee to approve valid certification agencies like the National Board of Trial Advocacy. The First Amendment probably permits such limited regulation designed to insure that the public is not deceived, but the complete ban on communicating National Board of Trial Advocacy certification cannot stand.

I. THE STATEMENT THAT A LAWYER IS CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY PROVIDES ACCURATE, MEANINGFUL AND HELPFUL INFORMATION TO THE PUBLIC AND IS NOT MISLEADING OR DECEPTIVE BECAUSE THE NATIONAL BOARD OF TRIAL ADVOCACY IS A WELL-RESPECTED, REPUTABLE AGENCY WHICH APPLIES OBJECTIVE, VERIFIABLE, RIGOROUS AND MEANINGFUL STANDARDS IN ITS CERTIFICATION PROCESS.

The National Board of Trial Advocacy was established in 1977 as a direct result of the Roscoe Pound — American Trial Lawyers Foundation Conference on Trial Specialty held in 1976. Its purpose was twofold. First, the National Board of Trial Advocacy sought to improve the quality of the trial bar by creating rigorous standards for certification to which lawyers could aspire. Second, the National Board of Trial Advocacy sought to improve the delivery of legal services to the public by providing an objective, verifiable measure of experience, ability and concentration in civil or criminal trial advocacy so that the public's choice of a lawyer for that type of case could be made in an informed manner. To these ends, the National Board of Trial Advocacy created a credentialling process along the lines followed in the medical profession for Board Certification. The National Board of Trial Advocacy program is national in scope, with substantial, meaningful criteria to insure that certified lawyers in fact have the special competence in their field of trial advocacy so that they may accurately be described as Civil or Criminal Trial Specialists.

The National Board of Trial Advocacy is endorsed in both its purposes and its program by seven well respected national organizations of lawyers and judges which are concerned with the quality of legal services in the trial advocacy area. They are:

- American Board of Professional Liability Attorneys
- Association of Trial Lawyers of America
- International Academy of Trial Lawyers
- International Society of Barristers
- National Association of Criminal Defense Lawyers
- National Association of Women Lawyers
- National District Attorneys Association

Each of these organizations, by their institutional sponsorship of the National Board of Trial Advocacy, has determined: (1) that the quality of the trial bar will be enhanced by the establishment of rigorous standards to which lawyers can aspire; (2) that the public interest in an informed selection of an attorney will be served by the creation of a credentialling program through which experienced and able trial specialists can be identified; and (3) that the National Board of Trial Advocacy standards and its certification process effectuate those goals.

The National Board of Trial Advocacy program is supervised and directed by a most distinguished group of lawyers, judges and legal educators. A complete listing of the achievements and honors of the 20 member Board of Directors and 20 member Honorary Board would cause this brief to exceed the allotted page limitations, but a brief description of some of the board members will help this court to understand the nature and quality of the National Board of Trial Advocacy program.

President and Chairman of the Board, J.D. Lee of Knoxville, Tennessee, has served as President of the Association of Trial Lawyers of America, President of the Trial Lawyers for Public Justice, President of the Tennessee Trial Lawyers Association, and President of the Tennessee Constitutional Convention. He is a Fellow of the International Society of Barristers and a Fellow and member of the Board of Directors of the International Academy of Trial Lawyers. Mr. Lee has authored four books and numerous articles on trial advocacy.

Founder and former Chairman of the Board, Theodore I. Koskoff of Bridgeport, Connecticut has served as President of the Association of Trial Lawyers of America, President of the Roscoe Pound — American Trial Lawyers Foundation, and President of the Connecticut Trial Lawyers Association. Until his recent death, Mr. Koskoff continued his relationship with the National Board of Trial Advocacy as Of Counsel to the Board.

Among the lawyer members of the Board are six former Presidents of the Association of Trial Lawyers of America, including J.D. Lee, as well as: Scott Baldwin from Marshall, Texas; Jacob D. Fuchsberg from New York, New York; Richard F. Gerry from San Diego, California; Robert L. Habush from Milwaukee, Wisconsin; and David S. Schrager from Philadelphia, Pennsylvania.

Two former Presidents of the International Academy of Trial Lawyers serve on the Board: Walter H. Beckham, Jr., from Miami, Florida; and Lee S. Kreindler from New York, New York. Other Board members who have served as President of major national and international trial lawyer organizations include: Kenneth S. Broun from Raleigh, North Carolina, former Director of the National Institute for Trial Advocacy (and former Dean of the University of North Carolina Law School); Judge Jim R. Carrigan from Denver, Colorado, former Director of the National Institute for Trial Advocacy; Joseph H. Cummins from Los Angeles, California, former President of the American Board of Trial Advocates; Mary Jo Cusack from Columbus, Ohio, former President of the National Association of Women Lawyers; Gerald S. Gold from Cleveland, Ohio, former President of the National Association of Criminal Defense Lawyers; Samuel Shore from Los Angeles, California, former President of the American Board of Professional Liability Attorneys, and Craig Spangenberg, of Cleveland, Ohio, former President of the International Society of Barristers and former Dean of the International Academy of Trial Lawyers.

Included among the Board of the National Board of Trial Advocacy are a number of distinguished judges and former judges. They include: Douglas K. Amdahl, Chief Justice of the Minnesota Supreme Court; Jim R. Carrigan, United States District Judge, District of Colorado, formerly Justice of the Colorado Supreme Court (and former Professor of Law at the University of Colorado Law School); William H. Erickson, Justice of the Colorado Supreme Court; Douglas W. Hillman, Chief Judge, United States District Court, Western District of Michigan; Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit; Joseph H. Rodriguez, United States District Judge, District of New Jersey; John A. Speziale, former Chief Justice of the Connecticut Supreme Court; and Henry Woods, United States District Judge, Eastern District of Arkansas.

The legal academic community is also represented on the Board of the National Board of Trial Advocacy. In addition to Judge Jim R. Carrigan, former Professor of Law at the University of Colorado Law School, and Kenneth S. Broun, former Dean of the University of North Carolina Law School, two current law professors and one law school dean serve on the Board. They are: David J. Sargent,

Dean of Suffolk University Law School in Boston, Massachusetts; James W. Jeans, Professor of Law at the Law School of the University of Missouri at Kansas City (and noted author on trial advocacy); and Stephen Wizner, Professor of Law at Yale Law School in New Haven, Connecticut.

The National Board of Trial Advocacy is in residence at Suffolk University Law School in Boston, Massachusetts, and its Executive Director is Suffolk University Law Professor Timothy Wilton. Professor Wilton, who supervises the day to day operations of the National Board of Trial Advocacy, received his B.A. in 1968 from Harvard University and his J.D. in 1971 and his LL.M. in 1977, both from Harvard Law School. Professor Wilton had extensive trial and litigation experience before he became a law professor in 1977. He teaches or has taught Trial Advocacy, Evidence, Civil Procedure Public Interest Litigation, and Constitutional Law. He has published extensively in trial and litigation related areas and has lectured at meetings of the American Bar Association and the Association of American Law Schools. Professor Wilton has recently been appointed to the Standing Committee on Specialization of the American Bar Association.

As the quality of its institutional sponsors, its Board, and its staff all demonstrate, the National Board of Trial Advocacy is a very well respected, reputable, *bona fide* legal organization, whose integrity and competence can be relied upon. As would be expected from an organization of this caliber, the standards and certification process it implements are rigorous and meaningful. The standards for certification as a Civil Trial Specialist are³ as follows:

3. The Illinois Supreme Court noted the discrepancy in the number of trials required for certification as described by Gary Peel, the Association of Trial Lawyers of America (ATLA), and the National Board of Trial Advocacy. The discrepancy apparently was a result of recent changes in this standard by the Board of Directors of the National Board of Trial Advocacy in an effort more accurately to describe a level of experience which should be required of a lawyer before he or she may be certified as a specialist. The National Board of Trial Advocacy brief outlined the current standard, while ATLA described an earlier standard. What is important is that the standard is and has always been a rigorous and substantial one, and one which demonstrates a significant level of experience in the specialty.

1. Current Bar Membership in Good Standing: Applicants must demonstrate current bar membership in good standing in the state of their admission, or, if admitted in more than one state, in the state of their principal practice.

2. Disclosure of Misconduct: Candidates for National Board of Trial Advocacy certification must disclose any convictions of crimes or proceedings in which they were subjected to professional discipline. The National Board of Trial Advocacy Board assesses any such instances of misconduct to determine the candidates' suitability for certification.

3. Years of Experience in the Specialty: Candidates must show at least five years of actual practice in civil trial law during the period immediately preceding the application for certification. Three years of extraordinary practice may be allowed in some cases.

4. Substantial Involvement in the Specialty: Applicants must show substantial involvement in trial practice; at least thirty percent of professional time must be spent in civil trial litigation during each of the five years preceding the filing of the application.

5. Substantial Experience in the Specialty: Candidates for civil trial certification must also demonstrate their experience by showing that they have appeared as lead counsel in not less than fifteen complete trials of civil matters to verdict or judgment, including not less than 45 full days of trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial.

6. Educational Requirements: Candidates must show participation in forty-five hours of continuing legal education in the specialty in the three year period preceding the application. This requirement may be fulfilled by a variety of activities approved by the National Board of Trial Advocacy Board of Directors. These activities include teaching courses or seminars in trial law; participation as a panelist, speaker, or workshop leader in conferences; authorship of books or professional articles on trial law; and participation in the work of professional committees.

7. Peer Review: Each candidate must provide as references the names of six attorneys who are not present partners or associates

of the candidate. These attorneys must be substantially involved in the candidate's field of trial law and must be familiar with the candidate's practice in that field. At least one reference must be from a judge before whom the candidate has appeared as an advocate within two years of application. At least two references must be from a lawyer with whom or against whom the candidate had tried a matter in that field. As a general matter, the National Board of Trial Advocacy requests, and candidates provide, references from three judges and three lawyers with or against whom they have tried cases. The six named references complete a confidential four-page questionnaire with rankings on various criteria regarding the candidate.

8. Trial Court Memorandum: Applicants must submit a copy of a substantial trial court memorandum or brief prepared and submitted to a court within three years of application. The quality of the memorandum or brief is carefully examined by the National Board of Trial Advocacy to determine qualification for certification.

9. Examination: Applicants must pass a rigorous day-long written examination designed to test experience, proficiency, and knowledge in civil or criminal trial law. This examination contains questions regarding substantive and procedural law as well as trial tactics in various areas of trial practice, and questions on evidence and professional ethics. The examination is administered twice every year throughout the nation, and a new examination is prepared for each administration.

Lawyers successfully fulfilling the requirements for certification must apply for recertification every five years. The recertification standards are designed to insure that the certified lawyer has continued an active trial practice. They are similar to the initial trial standards except that the applicant does not need to retake the examination or submit another trial brief, and the number of trials and other matters required is less. Otherwise, the standards again require current good standing in the Bar, disclosure of professional discipline, participation as lead counsel in a number of complete trials, continuing legal education in the specialty, and additional references from lawyers and judges.

In addition to rigorously testing the experience, skill, and proficiency of candidates for certification, the National Board of Trial Advocacy certification process is impartial and objective to protect

the public from unreliable claims of special expertise in trial advocacy. No preference is given in the certification process to members of sponsoring organizations. Board members cannot seek certification while serving on the Board. Examinations are graded anonymously, by number rather than name. In addition, the standards are applied in a rigorous, meaningful fashion. Applicants have been rejected because of insufficiency of trial experience as lead counsel, inadequate quality of the sample trial memorandum, lack of adequate participation in continuing legal education, or below average ratings on peer review. In addition, many applicants have been rejected for insufficient performance on the rigorous and demanding examination. A lawyer who is refused certification or recertification may not apply again for certification until one year after the date of such refusal, denial, or revocation.

As the preceding discussion demonstrates, the National Board of Trial Advocacy is a well respected, reputable organization which applies rigorous, comprehensive standards in its certification process. A lawyer who satisfies these standards in fact has demonstrated a special competence in civil trial advocacy by reason of his *concentration* of a substantial percentage of his professional time in the specialty, his extensive *experience* in the specialty, indicated by being lead counsel in 15 complete trials and 40 other matters, as well as the requirements of five years of concentration in the specialty and 45 hours of continuing legal education in the specialty, and significant *ability* in the specialty as evidenced by superior ratings on peer review questionnaires by judges and other lawyers, on the submitted trial memorandum, and on the day-long comprehensive examination. The fact that a lawyer has met these rigorous standards is information which a person seeking a lawyer for such a case would find helpful and relevant in selecting an attorney. Such a lawyer can accurately be called a Civil Trial Specialist, without in any way deceiving the public.

The traditional concern with a lawyer's holding himself out as a specialist is that the term implies that the lawyer has special competence in the field beyond that of other non-specialist lawyers. While that implication may be deceptive in some cases in the absence of standards to insure that the lawyer in fact has special competence, in the case of an attorney certified by the National Board of Trial

Advocacy, it is true and accurate. Lawyers who meet the National Board of Trial Advocacy requirements have indeed demonstrated that they possess experience and ability beyond that of the average lawyer. This is precisely the kind of truthful, accurate, relevant information which the public should have access to.

II. TWO STATE SUPREME COURTS HAVE HELD THAT A STATEMENT OF NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION IS NOT DECEPTIVE AND THAT THEIR DISCIPLINARY RULES WHICH PROHIBITED SUCH SPEECH CONFLICTED WITH THE FIRST AMENDMENT; UNTIL THIS CASE, NO COURT HAS EVER HELD TO THE CONTRARY; OTHER STATES HAVE ALSO FORMALLY RECOGNIZED NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION.

On two previous occasions, the Supreme Courts of other states have considered the interaction of the First Amendment, their disciplinary rules regarding specialty advertising, which were similar to Illinois' DR 2-105, and a lawyer's public statement that he was certified by the National Board of Trial Advocacy. In both cases, the disciplinary rules were struck down as unconstitutional because they prohibited the dissemination of this truthful, relevant and non-deceptive information. These are the only other two cases to consider this question, and other than in the instant case, no court has ever held to the contrary.

In *In Re Johnson*, 341 N.W.2d 282 (Minn. 1983), the Minnesota Supreme Court reviewed the disciplinary proceedings brought against an attorney for advertising his certification by the National Board of Trial Advocacy. The court found its own rule unconstitutional as applied to this situation:

Richard W. Johnson was admonished for advertising his certification as a Civil Trial Specialist by the National Board of Trial Advocacy (NBTA). Rule 2-105(B) of the Minnesota Code of Professional Responsibility prohibits a lawyer from holding himself or herself out as a specialist. Disciplinary Rule (DR)2-105(B) is unconstitutional and the admonishment against Johnson is vacated.

Id. at 282. The court reviewed the First Amendment precedents, as

well as the certification process of the National Board of Trial Advocacy, which the court found to be "rigorous and exacting:"

NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both.

Id. at 283. Finally the court commented on the laudable purposes of the disciplinary rule, but noted its overbreadth in suppressing non-deceptive certifications like that of the National Board of Trial Advocacy, and held it to be unconstitutional:

Applying *R.M.J.* and *Appert* [*Matter of Discipline of Appert*, 315 N.W.2d 204 (Minn. 1981)] to the facts of this case, it appears that DR 2-105(B) is too restrictive. The rule is designed to prevent misleading an uninformed public by claims of specialization and quality of services. That in and of itself is a meritorious goal. But the method used to achieve that goal is to impose a blanket prohibition on all commercial speech regarding specialization until the Minnesota Supreme Court promulgates rules describing what specialty designations will be accepted and how to get that designation. In view of the overbreadth of the rule, the lack of presentation to this court of proposed rules, and the finding of the panel that this advertisement was not misleading or deceptive, there is no basis for upholding the rule in this case. DR 2-105(B) is hereby declared unconstitutional on its face and as applied and the admonition issued by the director of the Board of Professional Responsibility against Richard W. Johnson is hereby vacated.

Id. at 285.

In response to this case, the Minnesota State Bar Association proposed, and the Minnesota Supreme Court adopted, a new disciplinary rule which outlined a program to regulate the advertising of specialty certification in order to protect the public from claims of certification based on inadequate standards. The program created a State Board of Legal Certification which reviewed and approved or disapproved certification agencies based on the quality of their program and the sufficiency of their standards. The National Board of Trial Advocacy has been approved as an authorized certifying agency by the Minnesota State Board of Legal Certification.

In *Ex Parte Howell*, 487 So. 2d 848 (Ala. 1986), the Alabama Supreme Court considered the constitutionality of its disciplinary rule regarding a lawyer holding himself out as a certified specialist, which

was similar to that of Illinois, as applied to certification by the National Board of Trial Advocacy. The Alabama Bar Association raised the same arguments in that case that the Disciplinary Commission has in this case, including the worry that permitting public statements regarding certification might "spawn spurious certifying organizations whose certifications would be meaningless." *Id.* at 851. The Alabama Supreme Court rejected these arguments. It held that the public dissemination of the fact of a lawyer's certification by the National Board of Trial Advocacy would be meaningful information for the public and not in any way deceptive or misleading:

It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given area of legal practice. Although there is presently no state-sanctioned mechanism for identifying legal specialists, it appears to us that a certification of specialty by the NBTA [National Board of Trial Advocacy] would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face.

Id.

The Alabama Supreme Court, with the benefit of the Minnesota experience to draw from, then directed the Bar Association to formulate a plan along the lines of the Minnesota plan to evaluate certifying agencies in order to protect the public from spurious agencies and meaningless certifications:

We direct the Bar Association to formulate a proposed rule and a method for approving certifying organizations such as the NBTA before allowing the certifications to be advertised. Such a procedure . . . will reduce the possibility of spurious certifying organizations being used to mislead the public.

Id. The Bar Association proposed, and the Alabama Supreme Court adopted such a rule. The National Board of Trial Advocacy has been approved under that rule.

In two other states, Connecticut and Georgia, the disciplinary rules have been amended without the need for litigation in order to create the same kind of approval process for certifying agencies as

exists in Minnesota and Alabama. The National Board of Trial Advocacy is approved in both Connecticut and Georgia.

In some other states, the Supreme Courts or Bar Associations have created their own certification process.⁴ The National Board of Trial Advocacy cooperates with and has been recognized by a number of these states. The National Board of Trial Advocacy requires that any applicant from a state which operates its own certification program must first be certified by that state program before he may apply for certification by the National Board of Trial Advocacy. When Florida implemented its own state certification program for Civil Trial Advocacy in 1982, for example, it recognized and accepted certification by the National Board of Trial Advocacy as a satisfactory equivalent for the Florida certification examination, so that lawyers with National Board of Trial Advocacy certification were exempted from the examination. The same recognition and exemption was included when Florida implemented its Criminal Trial Advocacy certification in 1986.

Thus, prior to this case, the states which have considered the question have uniformly determined: (1) that the National Board of Trial Advocacy is a reputable organization with rigorous and comprehensive certification standards; (2) that a lawyer's public statement of his certification by the National Board of Trial Advocacy is useful, accurate information for the public, and is not misleading or deceptive; and (3) that discipline of an attorney for publicly stating that he is certified by the National Board of Trial Advocacy would violate the First Amendment.

CONCLUSION

This court should resolve the confusion among the states, the disparate treatment afforded the over 1,000 attorneys throughout the nation who are certified as Criminal or Civil Trial Specialists by the National Board of Trial Advocacy, who may tell the public of their certification in some states, but risk professional discipline in others for such action. This court should consider whether the truthful statement of certification by the National Board of Trial Advocacy is protected by the First Amendment. The writ of certiorari should be granted.

4. See note 1, *supra*.

Respectfully submitted,
NATIONAL BOARD OF TRIAL ADVOCACY
by its attorney,

Timothy Wilton
Professor of Law
Executive Director
National Board of Trial Advocacy
in residence at:
Suffolk University Law School
Beacon Hill
Boston, MA 02114-4280
(617) 573-8700